

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35187

224883

**GRAND ELK RAILROAD, LLC –
LEASE AND OPERATION EXEMPTION –
NORFOLK SOUTHERN RAILWAY COMPANY**

AND

FINANCE DOCKET NO. 35188

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**WATCO COMPANIES, INC. –
CONTINUANCE IN CONTROL EXEMPTION –
GRAND ELK RAILROAD, LLC**

**UNITED TRANSPORTATION UNION'S
PETITION TO REVOKE EXEMPTION**

FEE RECEIVED

APR 14 2009

**SURFACE
TRANSPORTATION BOARD**

FILED
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**UNITED TRANSPORTATION UNION'S
PETITION TO REVOKE**

United Transportation Union ("UTU") respectfully moves the Surface Transportation Board ("STB" or "Board") to revoke the exemptions in the above-captioned proceedings. On November 3, 2008, Grand Elk Railroad ("GER") filed its Verified Notice of Exemption pursuant to 49 C.F.R. § 1150.31, *et seq.* Simultaneously, Watco Companies ("Watco") filed its Notice of Exemption pursuant to 49 C.F.R. § 1180.2(d)(2). UTU believes these filings are misleading and should be revoked.

STATEMENT OF FACTS

A. Description of the Proposed Transaction

GER is a new, wholly owned, non-carrier subsidiary of Watco Companies, Inc., headquartered in Kalamazoo, MI. In this proposed transaction, GER will lease 122.9 miles of Norfolk Southern Railway Company ("NS") rail lines between a point just outside of Elkhart Yard in Indiana and Grand Rapids, Michigan via Kalamazoo, Michigan (collectively, the "Kalamazoo Branch"). GER also will lease the Botsford Yard outside Kalamazoo for train and car handling purposes. Finally, GER will obtain incidental trackage rights over a 0.43-mile segment of the Michigan Main Line to connect Botsford Yard and the Kalamazoo Branch. Finance Docket No. 35187 Notice of Exemption at p. 4.

This proposed transaction involves some of the same rail lines, and essentially the same parties, as an earlier proposed transaction reviewed in STB Finance Docket No. 35063, *Michigan Central Railways, LLC – Acquisition and Operation Exemption – Lines of Norfolk Southern Railway Company* (the "Michigan Central Transaction"), the approval of which was denied by the STB in a decision served on December 10, 2007. *Id.*

GER will lease and operate the rail lines owned by NS and is located between (1) Milepost KII 1.4, at Elkhart, IN, and Milepost KH 27.4, at Three Rivers, MI (2) Milepost FB 27.3 at Three

Rivers, MI, and Milepost FB 102 3, at Grand Rapids, MI, (3) Milepost KZ 94 25 and Milepost KZ 95 0 (Kalamazoo Industrial Track), (4) Milepost OW 66 6 and Milepost OW 70 24 (Plainwell Industrial Track), (5) Milepost XH 88 10 and Milepost XH 92.40 (Hastings Running Track), (6) Milepost CQ 42 8 and Milepost CQ 43 9 (CK&S Industrial Track), along with the yard tracks in Botsford Yard located between Milepost MH 141 8 and Milepost MH 142 7 In addition, GER will be granted incidental trackage rights over the NS rail line located between Milepost 143 03 and Milepost 142 60, at the Botsford Yard *Id* at 7-8

GER certified that its projected revenues as a result of this transaction will not result in GER becoming a Class II or Class I rail carrier The projected annual revenue of GER may exceed \$5 million though GER claims that the revenue projection is optimistic, given the economic and market forces that have led to this Grand Elk Transaction such as the announced closure of the General Motors stamping plant in Grand Rapids, MI (the largest shipper on the lines) Nevertheless, GER states that it will be better able to arrest and reverse the declining traffic patterns that have become endemic to the leased lines. *Id* at p 8 (emphasis supplied)

GER claims the lease agreement between GER and NS will not contain any provision that prohibits GER from interchanging traffic with a third party

In Finance Docket No 35188, Watco also filed its Notice of Exemption on November 3, 2008 In this related transaction, Watco filed to continue in control of GER upon GER becoming a Class III railroad Watco, a non-carrier, is a Kansas corporation which currently controls nineteen (19) Class III railroads operating in 16 states Watco also owns 100 percent of the issued and outstanding stock of GER, a Delaware limited liability company and a non-carrier that was formed for the purpose of leasing and operating certain rail lines owned by NS Finance Docket No 35188 Notice of Exemption at p 3

Watco also controls, through stock ownership and management, the South Kansas and Oklahoma Railroad Company ("SKO"), Palouse River & Coulee City Railroad, Inc ("PRCC"), the Timber Rock Railroad, Inc. ("TIBR"), the Stillwater Central Railroad Inc ("SLWC"), the Eastern Idaho Railroad, Inc ("EIRR"), Kansas & Oklahoma Railroad ("K&O"), the Pennsylvania Southwestern Railroad, Inc ("PSWR"), the Great Northwest Railroad, Inc ("GNR"), the Kaw River Railroad, Inc. ("KRR"), the Mission Mountain Railroad, Inc ("MMT"), the Mississippi Southern Railroad, Inc ("MSRR"), the Yellowstone Valley Railroad, Inc ("YVRR"), the Louisiana Southern Railroad, Inc. ("LSRR"), the Arkansas Southern Railroad, Inc ("ARSR"), the Alabama Southern Railroad, Inc ("ABS"), the Vicksburg Southern Railroad, Inc ("VSOR"), the Austin Western Railroad, Inc ("AWRR"), the Baton Rouge Southern Railroad, LLC ("BRSR") and the Pacific Sun Railroad, LLC ("PSRR") SKO, PRCC, TIBR, SLWC, EIRR, K&O, PSWR, GNR, KRR, MMT, MSRR, YVRR, LSRR, ARSR, ABS, VSOR, AWRR, BRSR and PSRR are Class III carriers which operate rail lines in 16 states. *Id* at p 4

The rail lines operated by SKO, PRCC, TIBR, SLWC, EIRR, K&O, PSWR, GNR, KRR, MMT, MSRR, YVRR, LSRR, ARSR, ABS, VSOR, AWRR, BRSR, and PSRR do not connect with the rail lines that will be operated by GER The rail lines that will be operated by GER are located in Indiana and Michigan No Watco rail carrier currently operates in Indiana or Michigan *Id*

GER claims that the proposed transaction will be successful in reversing the significant decline in rail carloadings on these lines GER states it will be better situated to work with customers and local communities to once again grow the traffic on the lines Finance Docket No. 35187 Notice of Exemption at p. 6 (emphasis supplied).

ARGUMENT

In proceedings involving notices of exemption, the Board determines, *inter alia*, (1) whether the proposed transaction falls within the scope of the class exemption, (2) whether the notice contains the information required by the Board's regulation, and (3) whether the information in the notice is complete (*i.e.*, includes all information required by the Board's regulations) and is not false or misleading.¹ Generally, if the notice of exemption meets these requirements, the Board will submit the exemption to become effective except in those circumstances where the notice presents substantially complicated or controversial matters for which the class exemption was not designed.²

¹*See e.g.*, 49 C.F.R. § 1150.32 (2), (e) (stating that, to qualify for class exemption for acquisitions and operations under Section 10901, applicant must file verified notice of exemption with required information and a brief caption summary, and - in the case of a carrier with projected annual revenue of at least \$5 million - post a labor notice); *id.* § 1150.32(c) (exemption is void *ab initio* if notice contains false or misleading information), *id.* §§ 1180.2(d), 1180.4(g) (transaction is exempt if it is within one of 8 specified categories and applicant files notice of exemption which includes information required by Board's regulations)

²*E.g.*, *Greenville County Economic Development Corp. - Discontinuance of Service Exemption - In Greenville County, SC*, AB-490X, STB Decision served January 29, 2004 (class exemption discontinuance procedures under an out-of-service exemption were not appropriate when the failure to initiate service were under pending litigation and not reported to the Board), *Burlington Northern and Santa Fe Ry. Co. - Acquisition and Operation Exemption - State of South Dakota*, Finance Docket No. 34645, Decision served January 14, 2005 WL 79210 (S.T.B.), at *2 ("South Dakota") (rejecting notice of exemption because class exemption is "typically reserved for uncomplicated and noncontroversial issues," whereas BNSF's notice of exemption involved lines then currently in litigation over a contractual dispute over the scope of rights retained under applicable agreements and the existence of access and purchase option rights, which complicated the transaction beyond the bounds intended for the class exemption procedure), *Riverview Trenton R.R. Co. - Acquisition and Operation Exemption - Crown Enterprises, Inc.*, Finance Docket No. 33980, Decision served Feb. 15, 2002, 2002 WL 226940 (S.T.B.), at *2 ("Riverview Trenton") (revoking exemption covered by notice because it involved the proposed conversion of private carrier operations into common carrier service, thereby raising issues of local control, and therefore attracting substantial controversy and opposition from the public agencies at risk of losing said control)

UTU asserts that GER's exemption filing in Finance Docket No. 35063 must be revoked on the basis that GER's notice and subsequent information were false and misleading.

A. January 29, 2009 Decision Herein.

The Board held in this decision the following:

According to GER, the lease contains a provision requiring GER to upgrade and to maintain the line to Federal Railroad Administration (FRA) Class 2 standards, and the penalty for failure to keep this commitment is termination of the lease, which would reestablish NS's obligation to provide service. GER states that it intends to invest \$8.9 million in start-up capital to upgrade the line and to improve service, listing several upgrades that it says it intends to make in order to improve service, including bridge replacement, track rehabilitation, and rehabilitation of the Botsford and Hugart yards.

Attempting to show that Watco's economic prospects might be too poor to allow GER to raise this start-up capital, UTU, BLET, and state senator Basham point to a Dunn & Bradstreet (D&B) rating and credit score for Watco Transportation Services. As noted by GER, however, the D&B rating is of questionable usefulness in evaluating Watco's ability to raise funds for upgrading the track of its subsidiary GER because (1) Watco Transportation Services is a subsidiary of Watco, not Watco itself, and (2) neither Watco nor Watco Transportation Services subscribes, or provides financial information to D&B. Moreover, even if the Board could assume arguendo that the D&B rating of Watco Transportation Services was accurate and relevant to Watco itself, the parties seeking a stay have failed to address whether GER could raise funds independently of Watco, whether Watco's alleged financial condition is likely to be long-term rather than a temporary condition related to current economic conditions, whether GER could maintain service at existing levels until upgrade funding could be secured, and whether service would decline if the property were not leased to GER. And none of UTU's discovery requests appear directed to Watco's and GER's current financial ability to fund the proposed upgrades, even if such a showing were determinative of whether to allow the exemption to become effective or to revoke, once effective.

State Senator Basham argues that the transaction would degrade service because GER intends to maintain the line at a Class 2 level, providing for a top speed of 25 mph, rather than at the "current NS level of Class 3 with a top speed of 40 mph. GER agrees that it

intends to maintain the line at the Class 2 level but responds that the line is, due to its condition, currently maintained at less than the Class 3 level - at the Class 2 level south of Kalamazoo, MI, and at the even lower Class 1 level (10 mph) north of Kalamazoo GER does not deny that the line is currently in poor condition but responds that it will be making investments that will raise the overall level of the line's condition to the Class 2 level and that these investments would not be necessary if the line were, as alleged by State Senator Basham, currently being maintained at the Class 3 level GER also states that it intends to use the sums budgeted for upgrades to work with the Michigan Department of Transportation to upgrade the public grade crossings cited by State Senator Basham and BLET as needing repair In light of GER's response, proponents have not shown that they are likely to prevail in showing that service would be degraded due to operation of the line at the Class 2 level.

* * *

State Senator Basham and BLET argue that the transaction would cause a large increase in traffic at Botsford Yard in Kalamazoo, and that this would lead to adverse environmental consequences and trigger the thresholds in the Board's environmental regulations for the submission of an environmental report Attempting to explain why traffic through Botsford yard would increase, proponents maintain that, under current NS procedures, traffic is blocked at Elkhart, and the train blocks are then moved to Botsford and Hugart yards where they are held for movement to subsequent destinations. They argue that, after the transaction, traffic that is currently classified at Elkhart for movement to Botsford and Hugart yards would no longer be classified at Elkhart but would be interchanged with GER at Elkhart and transported to Botsford Yard alone for blocking and movement to subsequent destinations They argue that this change would clog Botsford Yard and cause trains to be backed-up and pulled forward on track overlapping the streets of downtown Kalamazoo.

In reply, GER presents credible reasons why Botsford yard would not see a large increase in traffic in the foreseeable future GER states that traffic in Botsford yard will actually decline because it will no longer handle westbound traffic to Niles or eastbound traffic to Battle Creek, Jackson, Ypsilanti, Wayne, and other locations Moreover, GER asserts that traffic will continue to be blocked at Elkhart for Kalamazoo and Grand Rapids and cars destined for the Grand Rapids area will be taken to Hugart Yard for switching, not to Botsford Yard. GER adds that it will handle all southbound traffic in Botsford Yard as NS does today Finally, GER asserts that its operating plan

contemplates keeping as many cars as possible out of Botsford Yard. In light of GER's reply, it is not apparent that BLET would be likely to show on the merits that there would be an increase in traffic at Botsford Yard sufficient to trigger environmental review.

BLET maintains that GER would be operating its trains through Kalamazoo during daylight hours, whereas NS currently runs the majority of this traffic at night, and that this would further interfere with peak hour vehicle traffic in Kalamazoo. GER responds that only two trains per day will operate in Kalamazoo during daylight hours, that those will be used to service local customers, and that the manifest trains destined for Elkhart will pass through Kalamazoo between 3:00 and 4:00 in the morning.

BLET argues that a lease held by NS to operate over certain industrial track owned by the Canadian National Railway Company ("CN") in Kalamazoo may expire in April 2009 and that, if it does expire, hazardous materials that are currently handled by CN over this track would be added to the traffic that is currently handled by Botsford Yard, thereby causing significant environmental impact. But BLET has not offered any explanation of why CN might not renew this 99-year lease or why the transaction in this proceeding would affect the transportation of these materials. NS's lease of CN's industrial track predates the transaction in this proceeding, and BLET has not shown how this proceeding could have any effect on whether NS's lease of CN's industrial track is renewed. GER states that it has not agreed to take over any CN traffic in the area and that any CN traffic moving into Botsford Yard in the future would be caused by a new and different transaction.

Slip Opinion Order at 4-7 (emphasis supplied).

GER claims the line is now maintained at less than a Class 3 level. In response, UTU asserts that the line is presently being operated at a Class 3 level at 40 mph in most places and even at 50 mph on one part (Declaration of Ken Bolender, attached hereto, at ¶ 2). Those places where it operates at 10 mph are simply slow orders (*Id.* at ¶ 3). As a result, these statements by GER about the track condition are truly misleading. Here, the track condition will actually go down from a Class 3 level to Class 2 level, which is the level GER claims it will operate the line (*Id.* at ¶ 4). GER operates the track at 25 mph now and intends to abandon the signal system (*Id.*).

Second, GER claims that Botsford Yard will not see a large increase in traffic. However, UTU asserts that Botsford Yard will actually see a large increase in traffic despite GER's statements otherwise. (Declaration of Grant E. Lapp, attached hereto, at ¶ 2). GER has told its new employees that most of GER's crews will operate out of Kalamazoo. (*Id.* at ¶ 3). Moreover, GER's statements regarding the loss of eastbound traffic is misleading because eastbound traffic has not been staged and switched there since the '70's. In other words, cars destined on this line for Jackson, Ypsilanti, and Wayne have never been staged or switched at Botsford Yard by NS. (*Id.* at ¶ 4). In addition, a Canadian National lease will expire on April 1, 2009, which will result in GER taking over the bulk of this work, greatly increasing the work at Botsford Yard. GER has also told its new employees that it will be taking over this CN work. (*Id.* at ¶ 5). In sum, Botsford Yard will have a great increase in activity, and consequently, this action calls for an Environmental Impact Statement.³

Finally, GER claims that the financial condition of this line has been declining under NS control and GER intends to reverse that trend. However, this statement is also misleading since NS has not attempted to increase business on this line, but instead has allowed it to die on the vine. (Declaration of Jerry L. Gibson, attached hereto, at ¶ 2). In fact, NS gave GER over thirty (30) customer leads between Kalamazoo and Grand Rapids that NS has never pursued to improve the financial condition of the trackage. (*Id.* at ¶ 3-4). As a result, GER's picture it has painted of coming in to rescue this failing line is deceptive in light of NS's lack of effort to improve the business.

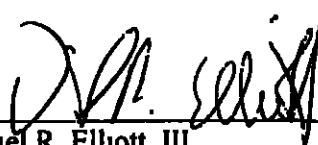
CONCLUSION

Based on these misleading representations by GER, the Petitions for Exemption in Finance

³(1) An increase of rail traffic of at least 100 percent or an increase of at least 8 trains a day on any segment of the line, (2) an increase in rail yard activity of at least 100 percent, or (3) an average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day. 49 C.F.R. § 1105.7(e)(5)

Docket Nos 35187 and 35188 should be revoked

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. R. Elliott, III", is written over a horizontal line.

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CERTIFICATE OF SERVICE

This will certify that a copy of United Transportation Union's Petition to Revoke has been served this 14th day of April, 2009 via first-class, postage pre-paid mail upon the following

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Daniel R Elliott, III
Associate General Counsel

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LEASE AND OPERATION EXEMPTION -
NORFOLK SOUTHERN RAILWAY COMPANY**

AND

FINANCE DOCKET NO. 35188

**WATCO COMPANIES, INC. -
CONTINUANCE IN CONTROL EXEMPTION -
GRAND ELK RAILROAD, LLC**

DECLARATION OF JERRY L. GIBSON

I, Jerry L. Gibson, pursuant to 28 U.S.C. § 1746, declare the following facts are true to the best of my knowledge and belief

1 I am State Director of the Michigan State Legislative Board for United Transportation Union and have been since October 1, 2005

2 GER claims the financial condition of this line has been declining under Norfolk Southern Railway Company's ("NS") control. However, NS has not attempted to increase business on this line, and has therefore neglected the financial aspect of the line

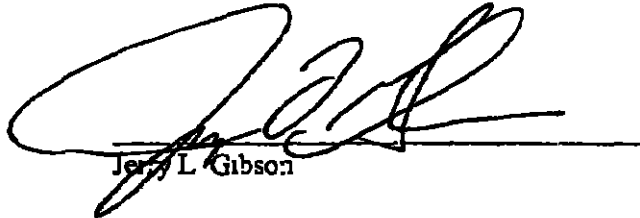
3 NS had no intention of improving the financial condition of this line, as it had over 30 customer leads which it never pursued

4 I became aware of these facts when Watco's Rick Webb told me NS had given him

over thirty customer leads for the trackage at issue here that NS had never pursued

I declare under penalty of perjury that the foregoing is true and correct

Executed on March 6, 2009.



Jerry L. Gibson

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CONTINUANCE IN CONTROL EXEMPTION -
GRAND ELK RAILROAD, LLC**

DECLARATION OF KEN BOLENDER

I, Ken Bolender, pursuant to 28 U S C § 1746, declare the following facts are true to the best of my knowledge and belief.

1. I am an employee of Norfolk Southern Railway Company ("NS") and have been for ten (10) years. I am also a member of the United Transportation Union.

2. For the last 10 years prior to this lease transaction, I have worked on subject trackage. I have acquired personal knowledge that the line had been operated by NS at a Class 3 level at 40 mph in most places and 50 mph on one part. See Exhibit 1 attached hereto.

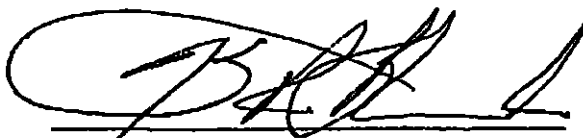
3. The areas that were operated by NS at 10 mph were due to slow orders. (Ex. 1)

4. GER's statements regarding the track condition are misleading as the track condition has declined from a Class 3 level, at which level GER claimed it was maintained by NS, to a Class

2 level Now, Grand Elk intends to abandon the signal system and has dropped the track speed to 25 mph

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 7, 2009



Ken Bolender

KALAMAZOO BRANCH						
STATION PAGE INFORMATION						
NOTE 1 Remotely Controlled by CNNA Dispatcher						
1. RULES IN EFFECT						
Between						Main Track
CP 421 and Park						Rules
Park and Burton						281
Gibson and BO BO Secondary						171
						93
2. MAXIMUM SPEEDS						
Between		SS	Main Track	Other Tracks		
		MPH				
CP 421 and Park			50			
Except						
MP KH 0 0 to MP KH 3 4			30			
CP 14 to CP-18, Signaled Siding		20				
MP KH 21 1 to MP KH 22 0			30			
MP KH 28 0 to MP FB 31 1			30			
MP FB 31 1 to MP FB 33 0			40			
Cowling to Park, Signaled Siding		30				
Park and Burton			40			
Except						
MP FB 40 7 to MP FB 41 1			25			
MP FB 50 8 to MP FB 54 0			30			
MP FB 54 0 to MP FB 54 6			15			
MP FB 54 8 to MP FB 57 3			25			
MP FB 68 9 to MP FB 69 5			30			
MP FB 68 0 and MP FB 70 0, Plainwell I T						
Restricted Speed not exceeding				15		
Gibson and BO, BO Secondary, Restricted Speed not exceeding				10		
3. CHECKING LOCOMOTIVE SPEED INDICATOR						
Tests for accuracy will be made at the following locations and Engineers will adjust speed in accordance with any inaccuracy						
LOCATION OF TEST MILE SIGNS:						
MP KH 9 0 to MP KH 10 0						
MP FB 44 0 to MP FB 45 0						
MP FB 81 0 to MP FB 82 0						
4. DIESEL UNIT RATINGS						
DIESEL UNIT RATINGS IN TONS						
	Group 1	Group 2	Group 3	Group 4	Group 5	Group 6
Northward						
Elkhart to Kalamazoo	2760	3880	3940	4870	6030	9103
Southward						
Kalamazoo to Elkhart	4170	5840	5910	7110	8840	14135

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**WATCO COMPANIES, INC. –
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GRAND ELK RAILROAD, LLC**

DECLARATION OF GRANT E. LAPP

I, Grant E Lapp, pursuant to 28 U S C § 1746, declare the following facts are true to the best of my knowledge and belief

1. I am a conductor for Norfolk Southern Railway Company ("NS") and have been for seven years. I have worked on the lines at issue in the above-captioned Finance Dockets during that time

2. I have worked at the Botsford Yard and believe that traffic will greatly increase as a result of these transactions despite GER's statement otherwise

3. I attended one of GER's Hiring Sessions where GER told its new employees that most of GER's crews will operate out of Kalamazoo, i e , Botsford Yard

4. GER's statements regarding the loss of eastbound traffic at Botsford Yard is

misleading because eastbound traffic has not been staged and switched there since the 70's. In other words, cars destined on this line for Jackson, Ypsilanti, and Wayne have never been staged or switched at Botsford Yard by NS.

5 On April 1, 2009, a Canadian National lease will expire in the Botsford Yard area. GER stated at one of its Hearing Sessions that it would take over this CN work after this expiration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Mar 6th, 2009

Grant E Lapp
Grant E Lapp